LAW REFORM
COMMISSION
OF
NOVA SCOTIA

Reform of the Nova Scotia *Wills Act*

Final Report - November 2003

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FINAL REPORT

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Law Reform Commission of Nova Scotia
November 2003

The Law Reform Commission of Nova Scotia was established in 1991 by the Government of Nova Scotia under an *Act* to *Establish an Independent Law Reform Commission.*

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Law Reform Commission of Nova Scotia

To: The Honourable Michael G. Baker, Q.C.
Minister of Justice and Attorney General

In accordance with section 12(3) of the *Law Reform Commission Act*, we are pleased to present the Commission's Final Report, **Reform of the Nova Scotia *Wills Act***.

Keith R. Evans
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SUMMARY

A will is the written statement by which a person instructs how his or her property should be distributed when that person dies. Although not mandatory, a will can be an important document for anyone who owns property. By enabling people upon death to have their property distributed as they wish, a will can provide peace of mind. A will can ensure that adequate financial support will be in place for potentially vulnerable people, such as young children. A will can also form the cornerstone of an estate planning strategy, designed to reduce the amount otherwise payable in taxes and probate fees.

In Nova Scotia, the *Wills Act* indicates who may create a valid will, how this should take place, and in what form. The *Wills Act* also sets out how a will may be cancelled or changed and provides some direction about interpreting a will.

The subject of wills is one in which fine details and technical aspects can be especially important. To help prevent misunderstanding and fraud, the law requires consistency in how property is transferred through wills. The *Wills Act* sets out a number of criteria which must be satisfied for the creation of a valid will. If one or more of these factors is not fulfilled, then the will may not be upheld, and the testator's wishes may not be put into effect.

A person who makes a will is known as the "testator". In a will, a testator leaves his or her property or "estate" to individuals or organizations known as "beneficiaries". Most testators name a person or company to act as "executor", who is given authority to act as the testator's personal representative after the testator dies. The executor's duties include gathering assets, paying debts and distributing what remains to the beneficiaries according to the terms of the will.

In general, a testator must be at least 19 years of age. Certain exceptions may apply. A testator may be younger than 19 if that person is married or has been married. Certain members of the military and mariners at sea may also be able to create valid wills, despite being under the age of 19.

The *Wills Act* requires that a will must be in writing and signed at the end by the testator, or by some other person in the testator's presence and by the testator's direction. The testator ordinarily must sign the will in the presence of two or more witnesses, who must also be present at the same time and sign (attest) the will in the testator's presence. A witness or the spouse of a witness cannot benefit under the will. There are no other requirements about witnesses set out in the *Wills Act*. A will which satisfies the requirements for being in writing, being witnessed, and being signed by the testator is known as formally valid.

Selected recommendations for reform

In July 2003, the Commission published the Discussion Paper, *Reform of the Nova Scotia Wills Act*, which contained the Commission's preliminary suggestions on reforming the *Wills Act*. Having taken into account the comments received on the Discussion Paper and having completed additional research where appropriate, the Commission makes a number of recommendations, which include the following:

- Holograph wills should be adopted in Nova Scotia.

- The privileged wills section should be retained in the *Wills Act*, but consistent with the majority of other Canadian jurisdictions, the term "active service" should replace the current standard of "actual military service."

- The *Wills Act* should not be changed to allow wills in non-paper format (video, cinematographic, or electronic) in Nova Scotia.

- When referring to the age at which a will may be validly created, the *Wills Act* should be consistent and should set the relevant age by reference to the *Age of Majority Act*.

- For people who are under the age of majority, yet who wish to create a valid will, the *Wills Act* should include a standard confirmatory procedure. An objective third party, such as the Public Trustee, should be appointed to certify whether a minor has the testamentary capacity required to create a valid will.

- The Prince Edward Island substantial compliance provision, which provides a court with discretion to allow as valid a will which does not comply with all formal requirements, but also requires as a minimum the deceased's signature, should be adopted in Nova Scotia.

- The current *Wills Act* provision which, subject to certain exceptions, revokes a will upon marriage should be retained. An amended *Wills Act* should clearly indicate that the revocation on marriage section also applies upon registration of a domestic partnership.

- A will should remain valid upon divorce or de-registration of a domestic partnership, but subject to a contrary intention in the will, the ex-spouse or former registered domestic partner should be treated as having predeceased the testator, and anything (gifts, benefits, or appointments) that would otherwise have been given to the ex-spouse or former registered domestic partner should be revoked.

- Section 15 of the *Wills Act* should be amended, to admit into probate wills validly made outside Nova Scotia with respect to real property, as it currently does for such wills involving personal property.

I. INTRODUCTION

1. The topic

A will is the written statement by which a person instructs how his or her property should be distributed when that person dies.[1] The *Wills Act*[2] governs the creation of a valid will in Nova Scotia. The *Wills Act* indicates who may create a valid will, how this should take place, and in what form. The *Wills Act* also sets out how a will may be cancelled or changed and provides some direction about interpreting a will.

2. Definitions

This Paper attempts to present legal information as clearly as possible. As some of the language relates to specific legal concepts, the words used may not be familiar to everyone. This section provides definitions of such words used in this Paper.

Act Law made by elected members of government. Also referred to as "statute" or "legislation".

Administrator Person appointed to administer the estate of a person who died without appointing an executor in a will or without leaving a will.

Attest When a witness signs a will to show he or she witnessed the testator signing the will.

Beneficiary Person or organization to whom property is left by a will.

Bequest Gift of personal property under a will.

Common law Law developed over the years by judges when making decisions in court.

Common law relationship When two people of the same or opposite sex live together as spouses, but are not legally married to each other and have not registered a domestic partnership.

Devise Gift of land under a will.

Estate Everything that a person owns at the time of his or her death.

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[1] D.A. Dukelow & B. Nuse, *A Dictionary of Canadian Law* (Scarborough, Ont.: Carswell, 1991) at 1162.

[2] R.S.N.S. 1989, c. 505 [hereinafter, the *Wills Act*].

Executor	A person or corporation named in a will to carry out the will's terms and to act as the deceased person's representative. Duties include gathering assets, paying debts, and distributing whatever remains in accordance with the will. An executor is a type of trustee, who holds property for the benefit of others.
Executrix	Sometimes used to describe a woman who acts as an executor.
Heir	Person entitled by legislation to receive the property of an intestate.
Holograph will	A will done entirely in the testator's handwriting and signed by the testator, but not witnessed.
Intestate	A person who dies without a valid will, thereby creating the situation of an intestacy.
Issue	A person's lineal descendants, such as children and grandchildren.
Legislation	Law made by elected members of government. Also referred to as "Act" or "statute".
Minor	A person under the age of majority, which is currently 19 in Nova Scotia.
Personal Property	Anything capable of ownership that is not real property.
Power of appointment	A power given to a person to choose who will receive certain property after the person to whom the power is given dies.
Privileged will	A will which does not have to satisfy the ordinary requirements for validity.
Probate	The legal procedure for proving that a will is the last will of the deceased, that the will is valid, and that the person or corporation named as executor is entitled to act. Probate enables the payment of a deceased person's debts and the transfer of a deceased person's assets to their beneficiaries to proceed in accordance with the will and in a prompt and orderly manner.
Public Trustee	A government office that may be appointed, among other matters, to act as guardian of someone who is found unable to manage his or her own affairs.
Real property	Land, buildings attached to land, as well as permanent fixtures or improvements to land.

Registered domestic partnership	What occurs when two people, regardless of their sex, who are in a conjugal relationship, but who are not married, register their relationship. Registering a domestic partnership provides many of the same rights and obligations applicable to married couples.
Revocation	An act by which a person who makes a will cancels it.
Statute	Law made by elected members of government. Also referred to as "Act" or "legislation".
Testamentary	Pertaining to wills.
Testamentary capacity	Whether a testator was of sound mind, memory and understanding at the time of making a will.
Testate	Describes a person who dies with a valid will.
Testator	Person who makes a will.
Testatrix	Sometimes used to describe a woman who makes a will.
Will	The written statement by which a person instructs how his or her property should be distributed when that person dies.

3. Prior reform efforts in Nova Scotia

The first Nova Scotia statute concerning wills was enacted in 1758.[3] Until the 19th century, the same legislation governed wills, intestacy, and probate. In 1840, following developments in England, Nova Scotia enacted a separate wills statute.[4] Although the current statute uses more modern language and contains some additional provisions, the origins of many sections in the present *Wills Act* can be traced to those in the 1840 legislation.

During the last century, the *Wills Act* was amended on only a few occasions, and those changes were limited in nature. In 1934, the Assembly removed a restriction on a married woman's ability to leave more property to her husband by way of will than he would have received in an intestacy.[5] In 1940, the rule was added that no will would be invalid simply

[3] S.N.S. 1758, c. 11.

[4] S.N.S. 1840, c. 25.

[5] S.N.S. 1934, c. 34.

because the testator did not leave any heirs or next-of-kin.[6] Changes in 1941 and 1956 made minor corrections to the *Wills Act*'s language.[7] In 1977, the Assembly eliminated an unnecessary phrase which seemed to imply that for some types of wills, a married woman would have to obtain her husband's consent.[8] In 1983, the right to make a valid will was extended to minors (people under the age of majority), if they were married or had been married.[9] Two years later, in 1985, concern that the *Wills Act* did not fully comply with the *Canadian Charter of Rights and Freedoms* led to additional changes which removed unjustified distinctions in the context of married women.[10]

4. Other reform efforts in Canada

In contrast to the infrequent amendment of the Nova Scotia *Wills Act*, for many years the topic of reforming wills legislation has interested the Conference of Commissioners on Uniformity of Legislation in Canada, as well as its successor, the Uniform Law Conference of Canada. The Uniform Law Conference of Canada (ULCC) is an independent organization which promotes the uniformity of legislation in Canada concerning subjects for which uniformity may be found possible and advantageous. The Conference first adopted a *Uniform Wills Act* in 1929.[11] Most Canadian jurisdictions have adopted parts of the *Uniform Wills Act*, which has been revised from time to time since 1929.[12] Whether a jurisdiction adopts a portion of the *Uniform Wills Act* depends on such factors as governmental priorities and the contents of the wills legislation in that jurisdiction. In 2000, Nova Scotia enacted Part III of the *Uniform Wills Act*, designed to give effect to an international agreement signed by the Canadian government on the form of international wills.[13] Among others which are not

[6] S.N.S. 1940, c. 25.

[7] S.N.S. 1941, c. 32; S.N.S. 1956, c. 47.

[8] S.N.S. 1977, c. 18, s. 28.

[9] S.N.S. 1983, c. 48, s. 1.

[10] S.N.S. 1985, c. 7, s. 18.

[11] Conference of Commissioners on Uniformity of Legislation in Canada, *Proceedings of the Twelfth Annual Meeting* (Quebec, Que., 1929) at 37.

[12] Online: Uniform Law Conference of Canada, "Uniform Statutes," "Table of Uniform statutes enacted, listed by statute,"<http://www.ulcc.ca/en/us/index.cfm?sec=3> (date accessed: 28 October 2003).

[13] S.N.S. 2000, c. 7. This *Act* made part of Nova Scotia law the *Convention Providing a Uniform Law on the Form of an International Will*. An "international will", namely one created in compliance with the Convention, will be valid as to form wherever the Convention applies, regardless of where the will is made,

included in the Nova Scotia *Wills Act*, the *Uniform Wills Act* contains provisions relating to the validity of holograph (handwritten & unwitnessed) wills, the validity of wills upon "substantial compliance" with the *Wills Act* and the effect of divorce on wills.[14]

Where relevant as a possible guide to reform, aspects of the *Uniform Wills Act* will be mentioned in this Discussion Paper.

In recent years, law reform commissions in Alberta, British Columbia, Manitoba, and Ontario have also examined wills legislation in their respective jurisdictions.

5. Development of the project

In 1999, the Commission published the Final Report, *Probate Reform in Nova Scotia*. The Commission had undertaken that project upon the request of the Nova Scotia government. The Commission's recommendations were well-received. The following year, a new *Probate Act*,[15] which reflected many of the Commission's proposals for reform, was enacted.

During the consultations which led to the probate Final Report, the Commission received a number of suggestions for reform of the *Wills Act*, a related statute. Although the Commission valued those suggestions, they were not directly part of the Commission's mandate to study the *Probate Act*. As a result, the Commission identified the *Wills Act* suggestions in an appendix to the *Probate Act* Final Report, but took no further steps. The Commission has decided to return to those additional suggestions, as part of a specific review of the *Wills Act*.

Although not mandatory, a will can be an important document for anyone who owns property. By enabling people upon death to have their property distributed as they wish, a will can provide peace of mind. A will can ensure that adequate financial support will be in place for potentially vulnerable people, such as young children. A will can also form the cornerstone of an estate planning strategy, designed to reduce the amount otherwise payable in taxes and probate fees. As the legislation which governs the creation of a valid will in Nova Scotia, the *Wills Act* is therefore not just important for people who work with wills, namely lawyers and judges, as well as employees of banks or trust companies. Rather, the *Wills Act* is significant for anyone in Nova Scotia who is concerned about how his or her property will be distributed upon death.

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and the location of the assets transferred by the will. An international will would therefore likely be of interest to those Nova Scotians who might move outside the province.

[14] Holograph wills are discussed below at part III.A.1. Substantial compliance is discussed at part III.A.6, and the effect of divorce is discussed at part III.B.2.

[15] S.N.S. 2000, c. 31.

Consistent with its usual practice, the Commission formed an Advisory Group, to help identify issues relevant to a discussion of possible reforms to the *Wills Act*. The Advisory Group consisted of people familiar with law and practices relating to wills and estates in Nova Scotia. Members of the Advisory Group included lawyers who practice in the area of wills, estates, and trusts, a lawyer from a financial institution, a probate registrar, and a professor of wills and trusts law from Dalhousie University's Faculty of Law. The Advisory Group met in March and May 2003, in order to review background materials prepared by Commission staff and to discuss how the *Wills Act* might be improved. The Commission is grateful for the participation and suggestions of the Advisory Group members, whose names are listed at Appendix B.

In July 2003, the Commission published the Discussion Paper, *Reform of the Nova Scotia Wills Act*. Copies of the Paper were sent, among others, to House of Assembly members, executives of the Nova Scotia Barristers' Society and the Canadian Bar Association - Nova Scotia Branch, Nova Scotia Department of Justice officials, and to university and public libraries. The Commission sent an announcement about the Discussion Paper to the province's newspapers, as well as to radio and television stations. CBC Radio, *The Daily News* (Halifax), *The Cape Breton Post* (Sydney), *The Vanguard* (Yarmouth), *The Lawyers Weekly* and *InForum* (Nova Scotia Barristers' Society) are among the media which mentioned publication of the Discussion Paper.

The Discussion Paper made a number of proposals for reforming the *Wills Act*, including: approaching in a consistent fashion the matter of a minimum age requirement for creating a valid will; adopting a "substantial compliance" provision, whereby a court could allow as valid in certain circumstances a will which did not comply with all formal requirements; providing a standard notice, which explains the effect of marriage on wills, to people who apply for a marriage licence; and admitting to probate valid wills from outside Nova Scotia with respect to real property, as is currently done for such wills which concern personal property. The Discussion Paper also invited comments on such issues as allowing holograph (handwritten & unwitnessed) wills, retaining privileged wills, permitting wills in non-paper format, and revoking wills upon divorce. Appendix A lists all of the Discussion Paper proposals.

The Commission was pleased with the number and nature of responses on the Discussion Paper, which was favourably received. Appendix B provides the names of those who commented on the Discussion Paper. Having taken into account the comments received, and having completed additional research where appropriate, the Commission has prepared this Final Report.

The next part of this Report provides general information on Nova Scotia's wills legislation and related topics. Part III contains discussion of specific issues as well as recommendations for reform.

II. GENERAL INFORMATION

1. What does a will do?

A will is the written statement by which a person instructs how his or her property should be distributed when that person dies.[16] A person who makes a will is known as the "testator".[17] If a person dies leaving a valid will, he or she is said to have died "testate".

In a will, a person leaves his or her property or "estate" to individuals or organizations known as "beneficiaries". Most testators name a person or company to act as "executor", who is given authority to act as the testator's personal representative after the testator dies.[18] The executor's duties include gathering assets, paying debts and distributing what remains to the beneficiaries according to the terms of the will.

2. Requirements for creating a formally valid will

The subject of wills is one in which fine details and technical aspects are especially significant. To help prevent misunderstanding and fraud, the law requires consistency in how property is transferred through wills. The *Wills Act* sets out a number of criteria which must be satisfied for the creation of a will to be valid. If one or more of these factors is not fulfilled, then the will may not be upheld. These factors help to ensure that only a testator's true intentions about disposing of his or her property in the event of death are put into effect. Requirements concerning how a will was created and its form can therefore be very important in discussions involving the law of wills.

The *Wills Act* requires that a will must be in writing and signed at the end by the testator, or by some other person in the testator's presence and by the testator's direction.[19] The testator ordinarily must sign the will in the presence of two or more witnesses, who must also be present at the same time and sign (attest) the will in the testator's presence. A witness or the

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[16] Dukelow & Nuse, note 1, above, at 1162. **This section is not meant as an exhaustive discussion of wills law. Rather, it is meant to provide an introduction to sections of the *Wills Act* and related concepts relevant to the Commission's proposals for reform.**

[17] "Testatrix" is sometimes used to describe a woman who makes a will. Unless otherwise required by the circumstances, "testator" will be used in this Final Report to refer to people, whether male or female, who make a will.

[18] "Executrix" is sometimes used to describe a woman who acts as executor. Unless otherwise required by the circumstances, "executor" will be used in this Final Report to refer to both male and female executors.

[19] *Wills Act*, note 2, above, s. 6.

spouse of a witness cannot benefit under the will.[20] There are no other requirements about witnesses set out in the *Wills Act*. In particular, consistent with other wills legislation in Canada, the *Wills Act* does not require a witness to be of a certain age.[21] A will which satisfies the requirements for being in writing, being witnessed, and being signed by the testator is known as formally valid.

3. Age of a testator

In general, a testator must be at least 19 years of age.[22] Certain exceptions may apply. A testator may be younger than 19 if that person is married or has been married.[23] Certain members of the military and mariners at sea may also be able to create valid wills, despite being under the age of 19.[24]

4. Testamentary capacity

In addition to the *Wills Act*, the common law imposes certain requirements for a valid will. Collectively, these requirements can be referred to as testamentary capacity, whether a testator was of "sound mind, memory and understanding" at the time of making a will.[25] A testator must understand what the will is meant to accomplish. The testator must be aware of the nature and extent of his or her property. The testator must appreciate who might benefit from the will, what each beneficiary might receive, and the claims of those who might be excluded under the will.[26]

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[20] Such a gift is void (invalid) unless there are two other witnesses who do not benefit under the will. If a gift in a will is void, that does not make the entire will invalid: *Wills Act*, note 2, above, s. 12.

[21] In accordance with the common law, a witness must be mentally competent and able to reason: J. MacKenzie, *Feeney's Canadian Law of Wills*, 4th ed. (Toronto: Butterworths, 2000), para. 4.29. The common law is a body of law developed over the years by judges when making decisions in court. A witness must also not be blind: D.A. Howlett, *Estate Matters in Atlantic Canada* (Scarborough, Ont.: Carswell, 1999) at 34.

[22] *Wills Act*, note 2, above, s. 4(1).

[23] This exception is discussed further at part III.A.4.

[24] For more information, see III.A.2.

[25] Quoted in *Canadian Estate Administration Guide*, vol. 1 (North York: CCH Canadian Ltd., 1997) at para. 7650.

[26] Note 25, above, at para. 7650.

5. When a will is not followed

At common law, a person had complete freedom to dispose of his or her property in a will.[27] The existence of certain legislation, however, now means that in some circumstances property may be distributed contrary to a testator's wishes. The *Testators' Family Maintenance Act*[28] applies if a person has made a will which does not adequately provide for his or her dependants. The dependants may apply to court for maintenance and support to be paid from the deceased's estate. The *Act* at s. 2 defines "dependant" as the testator's widow, widower or child, with "child" in turn defined as including both natural and adopted children, as well as natural children of the testator not born at the date of the testator's death.[29] The *Act* does not distinguish between children born inside or outside of a marriage. In addition to married people, the *Act* applies to registered domestic partners.[30] It does not, however, apply to common law relationships, in which two people of the same or opposite sex live together as spouses, but are not legally married to each other and have not registered a domestic partnership.[31] The *Act* lists factors to be considered by the court on an application for support, including the dependant's financial circumstances, the claims of any other dependants and the

[27] MacKenzie, note 21, above, at para. 2.6.

[28] R.S.N.S. 1989, c. 465.

[29] Under the *Children and Family Services Act*, R.S.N.S. 1989, c. 5, s. 80, an adopted child is treated "for all purposes" as the child of the adopting parents. However, the decision in *Hart* v. *Hart Estate* (1993), 124 N.S.R. (2d) 333 (N.S.S.C.), allowed an adopted person's *Testators' Family Maintenance Act* claim against the estate of a natural parent. As a result, an adopted person in Nova Scotia may be entitled to claim as a dependant against the estates of both natural and adoptive parents.

[30] S.N.S. 2000, c. 29 s. 45; A registered domestic partnership occurs when two people, regardless of their sex, who are in a conjugal relationship, but who are not married, register their relationship. Registering a domestic partnership provides domestic partners with many of the same rights and obligations applicable to married couples: Online: Service Nova Scotia & Municipal Relations, "Vital Statistics - Domestic Partnerships," <www.gov.ns.ca/snsmr/vstat/certificates/domestic.asp> (date accessed: 28 October 2003). More particularly, under the *Vital Statistics Act*, R.S.N.S. 1989, c. 494, s. 54, upon registration of a domestic partnership, domestic partners have, as between themselves, and with respect to any person, the same rights and obligations as a "wife or husband" under the *Wills Act* and are subject to the "same operations of law" as a "wife or husband" under the *Wills Act*. This Final Report recommends (see parts III.A.5 and III. B) that where relevant, application of the *Wills Act* to registered domestic partnerships should be made explicit in the *Wills Act* itself.

[31] C. L. Chewter & R. Hartleib, *Understanding the Law: A Guide for Women in Nova Scotia*, 4th ed. (Halifax: Nova Scotia Association of Women and the Law, 2002) at 13, 108; Howlett, note 21, above, at 162.

relationship of the dependant and testator at the time of the testator's death.[32]

The *Matrimonial Property Act* also applies to people who are married, or to registered domestic partners, but it does not relate to common law spouses.[33] It provides that where a spouse has died, the surviving spouse may apply to have matrimonial assets divided in equal shares, regardless of ownership.[34] This right is in addition to any other rights the spouse has as a result of the death of the other spouse. For example, the spouse may have rights as a dependant under the *Testators' Family Maintenance Act*. The spouse may also have rights under the will. Nova Scotia courts have held that a division of property under the *Matrimonial Property Act* takes place before the provisions of a will are applied.[35] As a result, a surviving spouse's share of property is deemed never to have been part of the deceased spouse's estate and is not available for distribution to the beneficiaries.

6. Dying without a valid will

A person who dies without leaving a valid will is said to have died "intestate". An "heir" is a person entitled by legislation to receive the property of an intestate. The *Intestate Succession Act*[36] lists the categories of heirs in order of priority. Entitlement is based upon being legally married to, in a registered domestic partnership with, or related to, the deceased. For example, if a testator upon death is survived by a spouse and two or more children, and the estate is worth more than $50,000, the spouse is entitled to $50,000 and one-third of the balance of the estate. The children are entitled to divide the remaining two-thirds equally. The spouse may, however, elect to take the matrimonial home. If it is worth more than $50,000, the spouse takes the home instead of the $50,000 entitlement. If the home is worth less than $50,000, it is taken as part of the $50,000 entitlement.

The *Intestate Succession Act* does not apply to common law spouses. Rather, it applies to married spouses and registered domestic partners.[37] Furthermore, the *Intestate Succession Act* does not permit spouses "living in adultery" at the time of the other's death to take any part of the

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[32] Note 28, above, s. 5.

[33] R.S.N.S. 1989, c. 275, s. 2(g); S.N.S. 2000, c. 29, s. 45; *Nova Scotia (Attorney General)* v. *Walsh*, 2002 SCC 83.

[34] *Matrimonial Property Act*, note 33, above, s. 12(1)(d).

[35] See, for example, *Fraser* v. *Fraser Estate* (1981), 50 N.S.R. (2d) 55 (T.D.), and *Pulley* v. *Pulley Estate* (1996), 153 N.S.R. (2d) 143 (S.C.), overturned for other reasons (1997), 159 N.S.R. (2d) 79 (C.A.).

[36] R.S.N.S. 1989, c. 236.

[37] S.N.S. 2000, c. 29, s. 45; Chewter & Hartleib, note 31, above, at 108.

deceased spouse's estate.[38] No distinction is made between the inheritance rights of children born inside or outside marriage. Both are entitled to claim as heirs to the estate of their natural father and the estate of their natural mother.[39] Adopted children will be able to claim as heirs against the estates of their adopting parents.[40]

If a person dies without leaving a valid will, there is no executor. The executor's duties still need to be performed, however, in that the assets must be gathered, the debts paid and the remainder of the estate distributed according to the *Intestate Succession Act*. In such cases, the *Probate Act* provides for the court to appoint an "administrator" to act as the deceased's personal representative with the same duties and responsibilities as an executor. The appointment is made according to the order of priority set out in the *Probate Act*.[41] The surviving spouse or registered domestic partner and any children resident in Nova Scotia are the first people entitled to be appointed as administrator.

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[38] *Intestate Succession Act*, note 36, above, s. 18.

[39] Under an earlier version of the *Intestate Succession Act*, children born outside of marriage could inherit from their natural mother, but not from their natural father. The relevant section of the *Act* was changed following two case decisions in which Nova Scotia courts found the section to be inconsistent with the *Canadian Charter of Rights and Freedoms*. See *Tighe* v. *McGillivray* (1994), 127 N.S.R. (2d) 313 (C.A.); *Surette et al.* v. *Harris Estate* (1989), 91 N.S.R. (2d) 418 (T.D.).

[40] The decision in *Hart* v. *Hart Estate*, note 29, above, though it specifically involved an adopted person's *Testators' Family Maintenance Act* claim, supported in general the inheritance rights of an adopted person against the estates of his or her natural parents. As a result, an adopted person in Nova Scotia, in addition to claiming as an heir against the estates of his or her adopting parents, may also be considered an heir in the event of intestacies involving the estates of his or her natural parents.

[41] *Probate Act*, note 15, above, s. 32.

7. Wills of First Nations people

The wills and estates sections of the federal *Indian Act* and the *Indian Estates Regulations* apply to First Nations people who are registered or entitled to be registered as an "Indian" under the *Indian Act* and who "ordinarily reside" on reserve or Crown lands.[42] People may be considered to ordinarily reside on reserve lands even if they are away, as long as they are only away temporarily, such as to attend school, to work or to stay in a health care facility.[43]

The requirements for a will in the *Indian Act* are less demanding than those set out in the provincial *Wills Act*. Under the *Indian Act*, any written instrument that is signed and in which a person indicates his or her intention regarding the disposition of property may be accepted as a will.[44] As a result, witnesses are not required, and holograph wills[45] may be acceptable.

A problem may arise, however, if a First Nations person makes a will that would be accepted as a will under the *Indian Act*, and that person later moves off reserve. If that person dies while off reserve, his or her family may attempt to process the estate in the provincial probate system. The will may not meet the provincial requirements and may be found to be invalid. The estate will then be considered intestate, and the testator's wishes may not be followed.

Another difference in administering estates of First Nations people is that the Minister of the Department of Indian Affairs and Northern Development may exercise powers that would otherwise be exercised by the Probate Court. For example, in accordance with the criteria at s. 46 of the *Indian Act*, the Minister may declare a will to be void. The Minister therefore exercises the powers of a judge over estate administration for First Nations people living on reserve.

This Paper will not deal specifically with the administration of estates under the *Indian Act*, as that topic falls within federal jurisdiction and is therefore outside the mandate of a provincial law reform commission. The issue of reform in this context would be more

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[42] R.S.C. 1985, c. I-5, ss. 4(3), 5-7, 42-52; C.R.C., 1978, c. 954. See generally L. Kraft, "Wills and Estates Under the *Indian Act*" (Paper presented to the Continuing Legal Education Society of Nova Scotia, 16 February 1996) [unpublished]; D.F. English, "A Written Will - A Promise Kept" (Paper presented to the Canadian Bar Association - Nova Scotia, 30 January 1998) [unpublished].

[43] Kraft, note 42, above, at 1.

[44] *Indian Act*, note 42, above, s. 45(2).

[45] A holograph will is done entirely in the testator's handwriting and is signed by the testator, but is not witnessed: *Canadian Estate Administration Guide*, note 25, above, at para. 5400. Holograph wills are discussed in detail at part III.A.1.

appropriately dealt with by the federal Law Commission of Canada, which considers the merits of reforming laws under the control of Parliament.[46]

III. RECOMMENDATIONS FOR REFORM

A. FORMATION OF A WILL

1. Holograph wills

A holograph will is done entirely in the testator's handwriting and is signed by the testator, but is not witnessed. It must show an intention by the testator to dispose of his or her property after death.[47] The majority of Canadian and United States jurisdictions, though not Nova Scotia, expressly allow holograph wills.[48] The *Uniform Wills Act* also provides that "[a] will, wholly in the testator's own writing and signed by the testator, is validly made..." without any witnesses required.[49]

An example of a holograph will being upheld as valid was in *Ley Estate* v. *Mifflen*.[50] The deceased L was an elderly widow who lived alone. The day after L died, a document titled "my last will & testament" was found inside a writing pad on L's kitchen table. The document listed various persons and charities with amounts or items listed after their names. L had signed the document. The New Brunswick Probate Court accepted that the document clearly showed L's testamentary intentions.

The Discussion Paper acknowledged there could be potential benefits and drawbacks associated with the express adoption of holograph wills in Nova Scotia. Holograph wills are free of charge, can be made at any time, and do not require the involvement of anyone other than the testator. These attributes, it was suggested, might convince

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[46] That Commission's website is online at: <www.lcc.gc.ca/en> (last accessed: 28 October 2003).

[47] MacKenzie, note 21, above, at para. 4.45.

[48] Howlett, note 21, above, at 32. The other two Canadian jurisdictions which do not provide for holograph wills are British Columbia and Prince Edward Island. Although the Nova Scotia *Wills Act* does not allow holograph wills in general, they may be permitted as a type of "privileged" will, a topic discussed at part III.A.2.

[49] *Uniform Wills Act*, Uniform Law Conference of Canada, *Consolidated Statutes* (Ottawa: The Conference, various dates) at 53-1, s. 6(2).

[50] (1987), 82 N.B.R. (2d) 18 (N.B. Prob. Ct.).

some people to create a holograph will rather than no will at all. The Discussion Paper also pointed out that as the preparation of holograph wills did not require legal advice, they might be unclear in their directions or lead to a greater number of disputes about authenticity. Rather than taking a position on holograph wills, the Discussion Paper asked readers for their comments.

The comments received tended to be divided between the two perspectives identified in the Discussion Paper. The Commission was particularly struck by one comment suggesting that the appropriateness of holograph wills should be considered in light of the major aims of wills legislation. As far as possible, the commentator suggested, laws concerning wills should be consistent across the country. This would enable people to move from province to province, without having to change their wills. Another suggested aim was that the criteria required for making a valid will should be as simple as possible. Third, the legislation should strive to ensure that valid testamentary intentions are put into effect whenever reasonably possible. The Commission agrees with the appropriateness of the suggested aims and concludes that adopting holograph wills in Nova Scotia would be consistent with all of them. Nova Scotia would join the majority of Canadian jurisdictions in this regard. The simplified requirements for creating a valid holograph will might appeal to some testators, such as those who would not otherwise have made a will, and the statute's capacity to uphold testamentary intention would be enhanced. For these reasons, the Commission recommends the adoption of holograph wills, and more particularly, the relevant *Uniform Wills Act* provision on holograph wills, in Nova Scotia.

The Commission recommends:

- Holograph wills, and more particularly, the *Uniform Wills Act* provision on holograph wills, should be adopted in Nova Scotia.

2. Privileged wills

The law has long recognized that it could be difficult for people in dangerous or inconvenient circumstances to satisfy the ordinary criteria for creation of a valid will. For instance, a soldier at the front may not have access to pen and paper. Even if writing materials are available, a will may be destroyed during battle, or a witness to a will may be killed or captured. As a result, soldiers in special circumstances have long been able to transfer their personal property by way of "privileged" wills, which do not have to satisfy ordinary requirements. Similarly, for many years mariners while

at sea have been able to make wills without having to satisfy the regular criteria. In Nova Scotia, as long as a witness is able to testify as to the intentions of certain soldier or mariner testators, expressed at some time before death, these wishes may be upheld even though not strictly in conformity with the ordinary requirements of wills legislation.[51] A privileged will under Nova Scotia law can even be an oral one. Privileged wills can transfer both personal and real property.[52]

If a person entitled to create a privileged will does so under the required special circumstances, but survives and is no longer subject to those conditions, the will remains valid indefinitely, like any other validly created will.[53] As a result, for example, a mariner who created a holograph will at sea would not have to re-write the will upon returning safely to land.

The ability to make a valid privileged will is not meant to be enjoyed by all soldiers. Legislation enabling privileged wills limits their availability to soldiers in certain situations. The Nova Scotia *Wills Act* uses the term "being in actual military service," which can be traced back to a 17th century English statute.[54] The majority of other Canadian provinces and territories use the term "active service," seemingly adopted from the *Uniform Wills Act*. In 1956, the term "active service" was added to the *Uniform Wills Act* as being consistent with the then-*National Defence Act*. The current version of the *National Defence Act* uses the same term. The Governor-in-Council (federal Cabinet) decides which members of the Canadian Forces will be placed on active service.[55] The term "active service" is not defined now, nor was it defined in the 1956 version of the *National Defence Act*. The *Uniform Wills Act* also does not define "active service," apart from indicating that "a member of a naval, land or air force is deemed to be on active service after he has taken steps under the orders of a superior officer preparatory to serving with or being attached to or seconded to a component of such a force that has been placed on active service."[56]

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[51] For example, though the *Wills Act* does not expressly allow holograph wills, they may be permitted if prepared by soldiers or mariners in the appropriate circumstances. Also, a soldier or mariner does not have to be at least 19 years of age in order to create a valid privileged will.

[52] *Wills Act*, note 2, above, s. 9.

[53] MacKenzie, note 21, above, at para. 4.96.

[54] *An Act for prevention of Fraud and Perjuryes*, 1677 (U.K.), 29 Cha. 2, c. 3, s. 22.

[55] For example, see *Order Placing Members of the Canadian Forces on Active Service (Arabian Peninsula)*, S.I./90-111, C. Gaz. 1990. II. 4199.

[56] *Uniform Wills Act*, note 49, above, s. 5(3).

The standard of "actual military service" that is used in Nova Scotia seems to be a higher one to satisfy than "active service." In *Re Wheatley's Estate,*[57] the Nova Scotia Probate Court had to determine the validity of a holograph will made by W, who had died during the 1980s as a member of the Canadian Forces on active service in Germany. After examining cases from England and Australia, the court decided that "active service" was not the same as "actual military service." "Actual military service" was treated as a more restrictive concept, which had to be "directly concerned with operations of war which is or has been in progress or is imminent."[58] By contrast, a person could be on "active service" during peace time.[59] With Canadian Forces in Germany during the 1980s not engaged in war or preparing for war, W did not qualify as a soldier in "actual military service" under the privileged will section of the Nova Scotia *Wills Act.* As holograph wills were not permitted under the *Wills Act,* the court did not admit W's holograph will to probate. The implication of the *Wheatley* case is that wills created by armed forces members at the same time and under the same conditions might be considered valid privileged wills in some provinces, but not in Nova Scotia.

The Discussion Paper did not take a position on privileged wills. Rather, it asked readers whether privileged wills were still necessary, and if so, whether any changes should be made to their availability, nature, or duration.

Comments on the retention of privileged wills tended to be mixed. Having taken all comments into account, the Commission is of the view there is still a need for privileged wills in Nova Scotia. Many military personnel reside here. From time to time, some are posted overseas. The Commission understands that the Canadian military encourages its members to have up-to-date wills, either through the services of a private lawyer or the completion of a standard Canadian Forces will form. Having a will is not, however, compulsory for Canadian Forces members. As a result, it is possible that a member of the military, and more particularly a Nova Scotian resident, could well find himself or herself in a situation where making a privileged will becomes necessary. Although this type of situation may not arise often, if the availability of a privileged will might prevent an intestacy and therefore put into effect a testator's wishes, retention of the privileged will provision would have proved worthwhile. As a result, the Commission agrees that the privileged wills section in the *Wills Act* should be retained.

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[57] (1984), 95 N.S.R. (2d) 66 (Prob. Ct.)

[58] Note 57, above, at 70.

[59] Note 57, above, at 73-74.

Having said this, the Commission acknowledges that the use of a different standard in Nova Scotia, "actual military service," rather than the more prevalent "active service," might lead to difficulties in the type of scenario addressed in *Re Wheatley's Estate*. As military personnel may be assigned to a number of different locations during the course of their careers, a privileged will recognized as valid by the law in most other Canadian jurisdictions might not be upheld as valid under current Nova Scotia law. In the interest of achieving greater consistency across the country in wills legislation and helping to avoid difficulties at the time a will is probated, the Commission recommends that the term "active service" should replace the current standard of "actual military service."

The Commission recommends:

- The privileged wills section should be retained in the *Wills Act*, but consistent with the majority of other Canadian jurisdictions, the term "active service" should replace the current standard of "actual military service".

3. Videotape, cinematographic & electronic wills

In theory, a will could be created in a non-paper format. This could involve wills on videotape, cinematographic film, or on electronic data retention devices, such as a computer diskette. This technology was not in existence when wills legislation was first created. Today, however, one might imagine a person reading aloud his or her testamentary wishes in front of a video or cinematographic camera. A person might also type a will using a computer keyboard and store the information on a computer diskette or hard drive.

With the exception of privileged wills, the *Wills Act* requires wills to be in writing and signed by the testator or by someone on his or her behalf. A tape or film of a testator reading his or her instructions would not be in writing, unless perhaps the tape or film also captured the complete text of the will. Similarly, a tape or film would lack the testator's signature. A computer diskette might arguably satisfy the requirement for a written will, in that the will's details, though stored in computer code, could be printed. The will's contents would nonetheless lack a signature from the testator.

In preparing the Discussion Paper, the Commission did not research the technical aspects of this issue, which would be essential to any meaningful proposals for reform. One would need to know, for instance, how easy it would be to tamper with the

images on a video or film, or the text on a diskette. The Commission had no indication there was a perceived need for such will formats in Nova Scotia. The Discussion Paper pointed to the example of Manitoba, a province with a similar size population. The Manitoba Law Reform Commission recently published a discussion paper on wills law in that province. Commenting on that discussion paper, Cliff Edwards, President of the Manitoba Commission, stated: "What we said in our discussion was this is probably something that should be looked at more carefully in a province with a bigger population base which might tend to have these problems, like Ontario or Quebec." He added, "In our province, we didn't feel it was such a big problem and we didn't go into it."[60]

This Commission's Discussion Paper invited readers' comments on whether there was any perceived need to allow wills in non-paper format (video, cinematographic, or electronic) in Nova Scotia. Those commentators who addressed this issue unanimously agreed there is no need to allow wills in non-paper format in Nova Scotia. Some commentators, further to the Discussion Paper's reference to Manitoba, added that if any initiative is to occur in relation to wills in non-paper format, this should take place in a more populous province, with a greater likelihood of demand being expressed for the allowance of such wills, and more resources for undertaking any necessary background studies.

Having taken into account the consensus among commentators, the Commission recommends that the *Wills Act* should not be changed to allow wills in non-paper format (video, cinematographic, or electronic) in Nova Scotia.

The Commission recommends:

- The *Wills Act* should not be changed to allow wills in non-paper format (video, cinematographic, or electronic) in Nova Scotia.

4. Wills by minors

In Nova Scotia, the age of majority, at which one acquires the full rights and responsibilities of an adult, is 19. A number of exceptions apply. For example, at 16,

[60] D. Driver, "Manitoba Law Reform Commission calls for changes in law on wills, succession" *The Lawyers' Weekly*, (27 June 2003) 18.

one may obtain a learner's driver's licence[61] or independently make a claim before the Small Claims Court.[62] At 17, one may join the armed forces.[63] A student under the age of 19 is bound by the terms of a student loan contract into which he or she enters.[64] In general, though, only people 19 years or older may make a valid will in Nova Scotia. This age requirement does not, however, apply to people who are married, or who have been married. Another exception involves Canadian Forces members or mariners at sea who take advantage of their ability to create privileged wills.

The Discussion Paper suggested that the *Wills Act*'s approach to the age of a testator may not be fair or appropriate in a number of instances. Many people under the age of 19 work[65] and in some cases, such as those involved in the high-tech industry or professional sports, are capable of accumulating significant wealth at an early age. Having taken the initiative to acquire such property, the Discussion Paper suggested, they would likely have an interest in how it is distributed in the event of their deaths. The Discussion Paper also suggested that single parents who have never married and who are younger than 19 would likely be surprised to learn that though able to raise a child, they are not entitled to make a valid will.

The Discussion Paper acknowledged that some minors may lack the maturity needed to plan for the distribution of their property in the event of their deaths. They may be impressionable and subject to the undue influence of others. The *Wills Act* seems to try to address this by setting the age of majority (19) as the minimum age at which one may ordinarily create a will. However, certain exceptions in the *Wills Act* mean that it does not treat all minors in the same manner. The Discussion Paper therefore suggested that as a matter of fairness and in recognition of societal trends, the matter of a minimum age requirement for creating a valid will, if it is to be part of the *Wills*

[61] If an applicant is under the age of 18, then permission from a parent or legal guardian will be required: Online: Service Nova Scotia and Municipal Relations, Registry of Motor Vehicles, "Learner's (Beginner's) Licence" <http://www.gov.ns.ca/snsmr/paal/RMV/paal378.asp> (date accessed: 10 November, 2003).

[62] *Small Claims Court Act*, R.S.N.S. 1989, c. 430, s. 17.

[63] Online: Canadian Forces, "Recruiting - Contact Us," <http://www.recruiting.forces.gc.ca/html/contact_us/apply_now.html> (date accessed: 10 November, 2003).

[64] *Student Aid Act Act*, R.S.N.S. 1989, c. 449, s. 6.

[65] In 1999, close to 38% of all Nova Scotian teenagers 15-19 years old worked at least one week a year: Online: Canadian Council on Social Development, "Still Struggling: An Update on Teenagers at Work," <http:www.ccsd.ca/pubs/2001/pcc2001/employ.htm> (date accessed: 6 November, 2003).

Act, should be approached consistently. The Discussion Paper also invited suggestions about what minimum age, if any, for making a will should be set out in the *Wills Act*.

Readers who commented on this issue tended to agree on the need for a consistent approach in relation to the minimum age of a testator. Although the need for consistency was agreed upon, perspectives differed on what age should be used.

To clarify an aspect raised by one of the commentators, the Commission is not aware of a legal inability by a minor to acquire and own property.[66] In particular, a minor may own both personal and real property. A gift to a minor is valid. A minor who works is the owner of his or her own wages. To protect minors, at common law, with certain exceptions, contracts made by minors are "voidable," meaning that they can be overturned, but only at the insistence of the minor. What this means, for example, in relation to land, is that though a minor may be able to own it, it may not be practical to register the land in the minor's name, given the possibility that any sales agreement involving the land might be ultimately challenged.

It was also suggested to the Commission that contrary to an example used at page 17 of the Discussion Paper, unmarried parents under the age of majority should be entitled to create valid wills, by virtue of the *Guardianship Act*.[67] Section 19 of that *Act* entitles "[a]n unmarried parent who is under the age of majority" to "appoint by will or by an instrument in writing executed in the presence of two witnesses, one or more persons to be the guardian or guardians of the person of the child after the death of or for any period during the lifetime of the person having care and custody." The Commission is not of the view that this section necessarily entitles a parent under the age of majority to make a valid will disposing of that person's property. Section 19 explicitly pertains to the appointment of a guardian, someone to have care and custody of a child. The section does not expressly refer to the disposition of property. Even if the *Guardianship Act* did permit unmarried, minor parents to dispose of their property by will, the law would remain inconsistent, in that unmarried minors without children still could not create a valid will, unless they qualified under another exception.

For the reasons identified in the Discussion Paper, the Commission affirms that the minimum age of a testator should be treated consistently in the *Wills Act*. An additional reason, one which was not highlighted in the Discussion Paper, is that to allow for differing ages of testators based upon a factor such as marriage could lead to a claim that the *Wills Act* is discriminatory and therefore contravenes the *Canadian Charter of Rights and Freedoms*.

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[66] J. Wilson, *Wilson on Children and the Law* (Markham, Ont.: Lexis Nexis Canada, 1994) at paras. 5.1 - 5.35.

[67] S.N.S. 2002, c. 8.

In the Commission's view, a simple yet consistent means of setting the minimum age of a testator should as a general rule be by reference to the standard age used in the *Age of Majority Act*.[68] In a 1981 report on wills legislation, when discussing the concept of "age of majority" in the British Columbia context, the B.C. Law Reform Commission suggested, "[i]t is at this age that an individual is generally considered to be sufficiently mature to understand his obligations to other people."[69] This approach would also be a flexible one, as any changes to the *Age of Majority Act* would be automatically reflected in the *Wills Act*.

Having suggested a general approach to a testator's minimum age, the Commission acknowledges there may be potential exceptions, though not in the arbitrary sense currently found in the *Wills Act*. Some minors might develop earlier, in an intellectual, emotional, or social sense, than others and show more maturity than their peers. Those minors may be just as qualified as any adult to make a reasoned decision about the disposition of their property on death. The Commission is therefore of the view that in addition to setting out a general minimum age for testators, the *Wills Act* should include a provision for exceptions in appropriate cases.

In its 1981 report, the B.C. Law Reform Commission proposed that B.C. law should be changed to allow a minor to apply to the B.C. Supreme Court for a declaration that he or she has testamentary capacity, despite not having reached the age of majority. The B.C. Commission suggested that it would be better not to provide the Public Trustee[70] with the power to decide on minors' testamentary capacity, as the Public Trustee's functions tend to be centralized in Vancouver. Although acknowledging that an impartial person, known as a "litigation guardian," would have to be found to act on behalf of the minor before the court, the B.C. Commission did not consider that to be a difficult problem.

This Commission similarly recommends that the *Wills Act* should include a standard confirmatory procedure, whereby the capacity of a minor to make a reasoned decision about the disposition of his or her property could be gauged. The Commission notes that it is fairly common for professionals to make determinations about capacity, as

[68] R.S.N.S. 1989, c. 4.

[69] Law Reform Commission of British Columbia, *Report on the Making and Revocation of Wills* (Vancouver: The Commission, 1981) at 18.

[70] The Public Trustee is a government office that may be appointed to, among other matters, act as guardian of someone who is found unable to manage his or her own affairs. Nova Scotia has a Public Trustee office, the duties of which are set out in the *Public Trustee Act*, R.S.N.S. 1989, c. 379.

when a lawyer decides that his or her client has the testamentary capacity needed to make a will. Unlike the B.C. Commission, however, this Commission is not of the view that certification decisions should be made by a court. Rather, for reasons of cost and convenience, certification would be provided by an objective third party, such as the Public Trustee.

The Commission recommends:

- When referring to the age at which a will may be validly created, the *Wills Act* should be consistent and should set the relevant age by reference to the *Age of Majority Act*.

- For people who are under the age of majority, yet who wish to create a valid will, the *Wills Act* should include a standard confirmatory procedure. An objective third party, such as the Public Trustee, should be appointed to certify whether a minor has the testamentary capacity required to create a valid will.

5. Executor as witness

Under s. 12 of the *Wills Act*, if a witness benefits in any way under the will, the benefit to that person will not be allowed. The witness will still be permitted, however, to attest to the will's validity in general. This section seems designed to avoid the possibility that a witness will falsely attest to the valid creation of a will in any event, simply because he or she benefits under the will. It is also possible that a witness who benefits under a will has put undue pressure on the testator to create the will. The question arises as to whether this rule applies to an executor.

The law requires a means to allow an executor to receive and distribute a testator's property upon the testator's death. To do so, the law makes a distinction between "legal" ownership of property and "beneficial" ownership. Where a will grants the property to him or her, a legal owner can sell or give the property, in accordance with the testator's instructions, but is not entitled to benefit. As the name suggests, a beneficial owner enjoys the benefits of a property.[71] An executor receives legal title to a testator's property, so the executor can deal with the property in the interest of beneficiaries under the will.

[71] See, for example, Howlett, note 21, above at 65, 285.

Section 12 specifically states, "[e]very devise, bequest or appointment, other than a charge or direction for the payment of debts, to an attesting witness of the will, or to the wife or husband of such witness, is void...."[72] The concern has been expressed that based on a literal reading of s. 12, "appointment" could include the appointment of an executor. The appointment of an executor could be challenged, simply because he or she had acted as an attesting witness. It is quite common for an executor to witness the signing of a will.[73]

By referring to a "devise bequest or appointment" without any qualifier, s. 12 fails to distinguish between receiving something under a will legally or beneficially. The word "beneficial" was part of the Nova Scotia statute until 1851, when deleted in what seems to have been an attempt to rid the statute of unnecessary language.[74] It has therefore been suggested that one can in part prevent problems involving executors in the context of s. 12 by re-inserting the term "beneficial" before "devise, bequest or appointment." The section would therefore read: "Every beneficial devise, bequest or appointment, other than a charge or direction for the payment of debts, to an attesting witness of the will, or to the wife or husband of such witness, is void...." If an executor is not a beneficiary under the will, his or her appointment would not be "beneficial," and there would be no difficulty arising from the executor having also served as a witness.[75]

Also deleted from the *Act* in 1851 was a qualifying phrase, "of or affecting any real or personal estate," which was formerly located in the *Act* immediately after the word, "appointment." The appointment of an executor is of a person. By contrast, an appointment "of or affecting any real or personal estate" would involve the power to give that real or personal property to someone. It has therefore been suggested that "of or affecting any real or personal estate" should be restored to the *Act*, to clarify that the section is not restricting the appointment of an executor.

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[72] A devise is a gift of land (real property) under a will, and a bequest is a gift of personal property under a will: *Canadian Estate Administration Guide*, note 25, above, at 503, 505.

[73] Howlett, note 21, above, at 36.

[74] Note 21, above, at 36-37.

[75] An executor is entitled to reimbursement of expenses, as well as a commission, which is set by law or by the terms of the will. These amounts are not considered a benefit under the will: Howlett, note 21, above, at 135.

A recent Nova Scotia case, *Re Kyte Estate*,[76] could signal that courts will not read s. 12 of the *Act* literally, to invalidate the appointment of executors who witness a will. A beneficiary applied for removal of an executrix. One of the witnesses to creation of the will had been the executrix's husband. The beneficiary argued that this was in conflict with s. 12 of the *Act*. In rejecting the beneficiary's argument, the Nova Scotia Probate Court held that the word "appointment" in s. 12 does not refer to the nomination or appointment of an executor or executrix. The court pointed out that the appointment of a person as an executor or executrix does not confer a specific benefit on that person.

In *Armstrong Estate* v. *Weisner*,[77] an executor had acted as one of the two witnesses to a will. This did not seem to concern the Supreme Court of Nova Scotia. However, the court questioned whether s. 12 in its current form could transfer property to an executor. The court reviewed the pre-1851 Nova Scotia *Act*, as well as the English legislation on which it had been modelled. The court concluded that the same interpretation should be used that would have applied prior to certain deletions from the pre-1851 *Act*. As a result, the court "read-in" or supplied certain missing language, and s. 12 was interpreted as if it contained the term, "beneficial," as well as the phrase "so far only as concerns such person attesting the execution of such will."

The Discussion Paper acknowledged that given the decisions in *Re Kyte Estate* and in *Armstrong Estate*, Nova Scotia courts may not be inclined to support the use of s. 12 of the *Act* to overturn the appointment of an executor who was also a witness to a will. The Discussion Paper went on to point out that the wording of s. 12 might still be problematic, in particular in light of the court in *Armstrong Estate* "reading-in" missing words in its interpretation. The Discussion Paper therefore suggested that s. 12 should be amended, to eliminate the possibility that it could be used to challenge the appointment of an executor who had witnessed a will.

Commentators either agreed with the Commission's proposal or acknowledged that amending s. 12 in the manner suggested by the Discussion Paper should do no harm. The Commission affirms its reasons from the Discussion Paper and recommends that s. 12 of the *Wills Act* should be amended, to eliminate the possibility that it could be used to challenge the appointment of an executor who had witnessed a will.

Upon further consideration, the Commission is also of the view that s. 12 should be amended in another fashion. S. 12 currently refers to the "wife or husband" of an

[76] *Kyte Estate, Re* (1998), 169 N.S.R. (2d) 192 (Prob. Ct.).

[77] (1969), 1 N.S.R. (1965-69) 58 (N.S.S.C.T.D.).

attesting witness. Under the *Vital Statistics Act*,[78] registered domestic partners have, as between themselves, and with respect to any person, the same rights and obligations as a "wife or husband" under the *Wills Act* and are subject to the "same operations of law" as a "wife or husband" under the *Wills Act*. At the moment, to become aware of the rights and obligations of a registered domestic partner under the *Wills Act*, one must refer to the *Vital Statistics Act*. As a matter of clarity and convenience, the Commission recommends that any matters of relevance to registered domestic partners should be expressly mentioned in the *Wills Act*.

The Commission recommends:

- Section 12 of the *Wills Act* should be amended, to eliminate the possibility that it could be used to challenge the appointment of an executor who had witnessed a will.
- At s. 12 and elsewhere, any matters of relevance to registered domestic partners should be expressly mentioned in the *Wills Act*.

6. Substantial compliance

Even if a will does not adhere to all formal requirements for its creation, a court might still find the will to be valid, if the failure to comply with certain formal criteria is not considered too serious. This is known as the concept of "substantial compliance". Substantial compliance attempts to give effect to a testator's wishes, if they can be established to the court's satisfaction, though not all criteria of the wills statute are fulfilled.

In some jurisdictions, courts are explicitly given the authority to find certain wills to be formally valid, though they have not met all requirements. For instance, the Prince Edward Island substantial compliance provision reads as follows:[79]

Sec. 70. ***Substantial compliance. – if on application to the Estates Section the court is satisfied***

[78] Note 30, above, s. 54.

[79] *Probate Act*, R.S.P.E.I., c. P-21, s. 70. Manitoba (R.S.M. 1988, c. W150, s. 23) New Brunswick (R.S.N.B. 1973, c. W9, s. 35.1), Quebec (Art. 714 C.C.Q.), and Saskatchewan (S.S. 1996, c. W-14. 1, s. 37) also have substantial compliance provisions.

(a) that a document was intended by the deceased to constitute his will and that the document embodies the testamentary intentions of the deceased; or

(b) that a document or writing on a document embodies the intention of a deceased to revoke, alter or revive a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will,

the court may, notwithstanding that the document or writing was not executed in compliance with all the formal requirements imposed by this Act but provided that the document or writing is signed by the deceased, order that the document or writing, as the case may be, be fully effective as though it had been executed in compliance with all the formal requirements imposed by this Act as the will of the deceased or as the revocation, alteration or revival of the will of the deceased or of the testamentary intention embodied in that other document, as the case may be.

In the Prince Edward Island wills legislation, the substantial compliance standard is therefore for the court to be "satisfied...that a document was intended by the deceased to constitute his will and that the document embodies the testamentary intentions of the deceased." If the court is so satisfied, and if the will has been signed by the deceased, then the court may deem the will to "be fully effective as though it had been executed in compliance with all the formal requirements imposed by this *Act* as the will of the deceased...." This standard gives discretion to the court, which must be "satisfied" that in the circumstances, the document embodies the deceased's testamentary intentions. Also included is a minimum, objective requirement, that the document contain the deceased's signature.

In jurisdictions without explicit substantial compliance provisions, courts have sometimes taken the initiative to apply substantial compliance reasoning. In *Sisson* v. *Park Street Baptist Church*,[80] an Ontario case, the court had to determine the validity of a will which did not fully comply with the formal requirements of the Ontario wills statute. The will in question did not include the required signatures of two witnesses. Although one witness, who was the lawyer for the testatrix, placed the date on the will, he neglected to sign the will.

The will did not contain two witnesses' signatures, but other details supported the argument that the will genuinely represented the intentions of the testatrix: there was a letter of instruction from the testatrix to her lawyers; two witnesses were present

[80] (1998), 24 E.T.R. (2d) 18 (Ont. Gen. Div.).

when the testatrix signed the will; one of the two witnesses signed the will; and the other witness placed the date on the will.

There was no statutory provision which expressly permitted the court to find the will to be valid, though it did not comply with all formal requirements. Referring to other cases where Ontario courts had accepted wills not completely adhering to formal criteria, the court reasoned that an absence of legislation should not prevent the court from developing the common law. In the matter before it, the court held that sufficient safeguards had been established to prevent the type of mischief that wills legislation had been created to avoid. Satisfied that the will reflected the intentions of the testatrix, the court accepted it.

By contrast, in *Siles* v. *Daley*, another recent Ontario decision,[81] the court was not willing to use a substantial compliance approach to uphold a will which had been created in an irregular manner. The *Siles* case involved a dispute over the validity of a will, the more recent of two attributed to the testatrix. The purported second will, contrary to Ontario law, had only been signed by one witness. Another, expected witness had refused to sign. Pointing out that the law required the signatures of two witnesses, the court refused to accept the second will as valid. Unlike the situation in *Sisson*, inadvertence did not seem to be an issue. Rather, the testatrix seemed to have been aware that she required two witnesses.

Although acknowledging the need for certain basic requirements for the creation of a valid will, the Discussion Paper suggested that in some cases, it could be harsh not to allow a testator's wishes because of non-compliance with formal or technical aspects of wills legislation. In certain circumstances, the Discussion Paper suggested, it should be appropriate for a court to find a will to be valid, even if the will did not comply with all formal requirements of the *Wills Act*.

As a matter of clarity and consistency, the Discussion Paper suggested that the circumstances in which a court in Nova Scotia would be entitled to find a will to be valid on the basis of substantial compliance should be made explicit. The Discussion Paper was in favour of making an express substantial compliance provision part of the *Wills Act*. The Discussion Paper suggested that the Prince Edward Island substantial compliance provision, which provides a court with discretion to allow as valid a will which does not comply with all formal requirements, but also requires as a minimum the deceased's signature on the document, should be adopted in Nova Scotia.

Commentators responded favourably to the Discussion Paper proposal on substantial compliance. The Commission remains of the view that the *Wills Act* would be

[81] (2002), 64 O.R. (3d) 19 (Sup. Ct. J.)

improved through the inclusion of a substantial compliance provision. This would be consistent with one of the primary aims of wills legislation, upholding the testator's intentions. It would not, however, be an invitation for people no longer to comply with the *Wills Act*'s formal requirements. Rather, it would be an acknowledgment that though a testator may inadvertently not comply with all statutory criteria for creation of a valid will, in some circumstances it may nonetheless be clear that the will embodies the testator's true intentions. In such a case, it may lead to harsh results if formal perfection is preferred to upholding the testator's wishes.

An express statutory substantial compliance provision is preferable, as it confirms for the courts their capacity to take a substantial compliance approach and provides direction as to its specifics. The Commission continues to think that the Prince Edward Island provision, which combines considerable court discretion with an objective requirement for the testator's signature, is an appropriate model to adopt in Nova Scotia.

The Commission recommends:

- The Prince Edward Island substantial compliance provision, which provides a court with discretion to allow as valid a will which does not comply with all formal requirements, but also requires as a minimum the deceased's signature, should be adopted in Nova Scotia.

B. REVOCATION OF A WILL

1. Effect of marriage

In all Canadian jurisdictions except Quebec, the general rule, subject to certain exceptions, is that legislation revokes wills upon marriage.[82] This recognizes marriage as a significant event, involving important new responsibilities. The reason for the rule seems to be to benefit the testator's new family, who as the testator's heirs, would inherit under a resulting intestacy.[83] In Nova Scotia, this general rule is subject to three exceptions: that the will declares it was made in contemplation of marriage; that the testator's wife or husband elects

[82] MacKenzie, note 21, above, at para. 5. 9.

[83] Note 21, above, at para. 5. 9.

in writing to take under the will; or that the will is made in exercise of a power of appointment over property which would not pass to the benefit of the testator's family if the power was not used.[84]

The Discussion Paper suggested that the current Nova Scotia provision concerning the effect of marriage is appropriate and should be retained. To enter upon marriage, it was suggested, is to agree to significant responsibilities in relation to another person. It was suggested that most people would, upon their deaths, wish their spouses to benefit from their estates. To revoke a will upon marriage encourages people to think about the implications of their new legal status and to make necessary changes in their instructions to apply in the event of death. If they fail to create another will, then other statutes (the *Intestate Succession Act*[85] and the *Matrimonial Property Act* [86]) would be available to ensure that their spouse, and if applicable, children, do benefit.

The Discussion Paper also suggested, based on anecdotal reports, that not many Nova Scotians are aware of the provision which revokes a will in the event of marriage. The Discussion Paper therefore suggested it would be helpful for the Issuer of Marriage Licences to provide a copy of a standard notice, which explains the effect of marriage on wills, to people who apply for a marriage licence.

The rule about revocation of a will upon marriage is a longstanding one. The original version of this rule first appeared in Nova Scotia legislation in 1840.[87] The Commission is not aware of any difficulties which tend to arise in relation to the rule's application in Nova Scotia. In the Commission's perspective, the same aim which likely led to adoption of the rule, helping to ensure that spouses and children are adequately provided for financially, is still relevant. Other law reform bodies which have studied equivalent versions of this rule and (allowing for

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[84] *Wills Act*, note 2, above, s. 17. It seems that by virtue of the *Vital Statistics Act*, note 30, above, s. 17 of the *Wills Act* would also apply to people who enter a registered domestic partnership. A power of appointment refers to a power given to a person to choose who will receive property after the person to whom the power is given dies: Dukelow & Nuse, note 1, above, at 795. For instance, a grandfather in his will could instruct that rather than giving his summer cottage outright to his daughter, he is allowing her to use the property for the rest of her life, along with a power of appointment, which if exercised at her death in her will would be put into effect to decide which of her children will receive the property.

[85] Note 36, above.

[86] Note 33, above.

[87] Note 4, above, s. 15.

local variations in wording) have all recommended its continuance.[88] For these reasons, as well as for those reasons set out in the Discussion Paper, the Commission recommends that the current *Wills Act* provision which, subject to certain exceptions, revokes a will upon marriage should be retained. Further to other recommendations in this Final Report, an amended *Wills Act* should clearly indicate that the revocation on marriage section also applies upon registration of a domestic partnership.

Commentators responded favourably to the Discussion Paper suggestion about a standard notice, which explains the effect of marriage on wills, to people who apply for a marriage licence. The Commission affirms this suggestion. Consistent with other Final Report proposals, the Commission also recommends that an equivalent notice should be provided by the Office of the Registrar General to people who wish to register a domestic partnership.

The Commission recommends:

- The current *Wills Act* provision which, subject to certain exceptions, revokes a will upon marriage should be retained.
- An amended *Wills Act* should clearly indicate that the revocation on marriage section also applies upon registration of a domestic partnership.
- The Issuer of Marriage Licences should provide a copy of a standard notice, which explains the effect of marriage on wills, to people who apply for a marriage licence. An equivalent notice should be provided by the Office of the Registrar General to people who wish to register a domestic partnership.

2. Effect of divorce

The *Wills Act* does not mention divorce. In some Canadian jurisdictions, if a testator makes a will and obtains a divorce prior to his or her death, and unless the will provides otherwise, any devise, bequest, appointment or power to the testator's spouse is revoked, and the will

[88] Law Reform Commission of British Columbia report, note 69, above, at 71-73; Great Britain, Law Reform Committee, Twenty-Second Report (*The Making and Revocation of Wills*) (London: HMSO, 1980) at 14-16; Manitoba Law Reform Commission, *Wills and Succession Legislation* (Winnipeg: The Commission, 2003) at 17-22.

is to be construed as if the spouse had pre-deceased the testator.[89] These provisions seem to have been inspired by the *Uniform Wills Act*, which provides:[90]

Effect of divorce

Where in a will

(a) a devise or bequest of a beneficial interest in property is made to a spouse;

(b) a spouse is appointed executor or trustee; or

(c) a general or special power of appointment is conferred upon a spouse.

and after the making of the will and before the death of the testator, the marriage of the testator is terminated by a decree absolute of divorce or his marriage is found to be void or declared a nullity by a court in a proceeding to which he is a party, then, unless a contrary intention appears in the will, the devise, bequest, appointment or power is revoked and the will shall be construed as if the spouse had predeceased the testator.

The Discussion Paper acknowledged there are reasons for and against extending the *Wills Act* to revoke wills upon divorce. Given the turmoil that can surround a divorce, having a will revoked may not be foremost in people's minds. There could be a tendency to forget about a will. This could lead to unforeseen and unwanted circumstances if a former spouse benefits under a will. On the other hand, in some situations, divorced spouses might still wish to provide for a former spouse in a will. These people might also consider it intrusive and inconvenient for legislation to automatically revoke a will upon divorce. The Discussion Paper invited comments about the appropriateness of having the *Wills Act* revoke wills upon divorce.

Comments were mixed about the feasibility of a rule to revoke a will or portion of it upon divorce. Some commentators suggested that people seeking a divorce should rely on their lawyers to discuss the need to reconsider the terms of an existing will. Another commentator suggested there would be no guarantee that the people who might benefit following revocation would be any more worthy in the testator's eyes than the ex-spouses. There was also significant support for a rule designed to ensure that a testator did not inadvertently leave some or all of his or her estate to an ex-spouse. Of the commentators who expressed support for a revocation on divorce rule, some preferred revocation of the entire will, while others

[89] British Columbia, R.S.B.C. 1996, c. 489, s. 16; Manitoba, R.S.M. 1988, c. W150; Ontario, R.S.O. 1990, c. S.26, s. 17(2); Saskatchewan, S.S. 1986, c. W - 14.1, s. 16.

[90] *Wills Act*, note 2, above, s. 17(2).

favoured a rule which would leave the will intact, but which would prevent the ex-spouse from deriving benefits under it.

Having taken all comments into account, the Commission is of the view that having one's will changed may not be foremost in a person's thoughts at the time of a divorce. Inadvertence may therefore lead to an ex-spouse benefitting under a will where this would not have represented the testator's post-divorce wish. Although a lawyer may recommend that a divorcing client consider changes to his or her will, the client may choose to put off such changes. Moreover, some people do not seek legal advice when obtaining a divorce. In either case, not changing a will may lead to unexpected and undesired results in the distribution of the testator's estate.

To help prevent unanticipated testamentary benefits to an ex-spouse following divorce, the Commission recommends adoption of the relevant *Uniform Wills Act* rule. This rule does not revoke an entire will. Rather, it revokes anything that would otherwise have been given to the ex-spouse under the will. It also treats an ex-spouse as having predeceased a testator. As a result, all other gifts made in the will are still valid. The rule will not, however, take effect if a will expresses a contrary intention. Consequently, a testator who still wishes to benefit an ex-spouse in the manner which his or her will sets out will be able to do so. The Commission notes that similar conclusions were reached recently by law reform bodies in Alberta and Manitoba,[91] and that relevant legislation in England achieves the same result.[92] In summary, the Commission recommends that a will should remain valid upon divorce, but subject to a contrary intention in the will, the ex-spouse should be treated as having predeceased the testator, and that anything (gifts, benefits, or appointments) that would otherwise have been transferred to the ex-spouse should be revoked. Further to other recommendations in this Final Report, an amended *Wills Act* should clearly indicate that the rule setting out the effect of divorce on a will also applies in the event that a domestic partnership is de-registered.

A number of commentators suggested a standard notice about the effect of divorce would be appropriate. The Commission agrees. Consistent with the Commission's recommendation involving a notice about the effect of marriage, a notice about the effect of divorce on wills should be provided to divorcing parties by the prothonotary (chief clerk) of the Nova Scotia Supreme Court. The Office of the Registrar General should provide an equivalent notice to people who de-register a domestic partnership.

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[91] Alberta Law Reform Institute, *Effect of Divorce on Wills* ([Edmonton]: The Institute, 1994) at 30-31; Manitoba Law Reform Commission, *Wills and Succession Legislation*, note 88, above, at 28.

[92] *Wills Act 1837* (U.K.), s. 18A, as amended by *Law Reform (Succession) Act 1995* (U.K.), c. 41, s. 3.

The Commission recommends:

- A will should remain valid upon divorce, but subject to a contrary intention in the will, the ex-spouse should be treated as having predeceased the testator, and anything (gifts, benefits, or appointments) that would otherwise have been given to the ex-spouse should be revoked. An amended *Wills Act* should clearly indicate that the rule setting out the effect of a divorce on a will also applies in the event that a domestic partnership is de-registered.

- Consistent with the Commission's recommendation involving a notice about the effect of marriage, a notice about the effect of divorce on wills should be provided to divorcing parties by the prothonotary of the Nova Scotia Supreme Court. The Office of the Registrar General should provide an equivalent notice to people who de-register a domestic partnership.

C. OPERATION AND INTERPRETATION OF A WILL

The anti-lapse section

At common law, if a beneficiary predeceases the testator, and the will does not indicate what should happen, the gift is presumed to "lapse", and be of no effect, thereby forming part of the remainder of the testator's estate. To prevent this from occurring, it is common for wills legislation to include an "anti-lapse" provision. When a person who is the child or other issue[93] of a testator is a beneficiary under the will and predeceases the testator, but leaves issue alive at the time of the testator's death, then by virtue of the anti-lapse provision, the gift to the deceased beneficiary shall not lapse, assuming that the will does not provide otherwise. Rather, as with section 31 of the *Wills Act*, a gift will take effect as if the death of the beneficiary had occurred immediately after the testator's death. The gift, however, becomes payable to the estate of the deceased beneficiary.

[93] "Issue" refers to a person's lineal descendants, such as children and grandchildren: Howlett, note 21, above, at 2. The *Wills Act* defines issue as "lawful lineal descendants," which would appear to exclude descendants born outside of marriage. Given that the decision in *Hart* v. *Hart Estate* (1993), note 40, above, upheld the inheritance rights of an adopted person against the estates of his or her biological parents, the *Wills Act* definition of "issue" may be subject to a court challenge as discriminatory and therefore not consistent with the *Canadian Charter of Rights and Freedoms*.

Therefore, under the *Wills Act* a gift from a testator to a beneficiary who dies before the testator is preserved only when the beneficiary is a descendant of the testator and has left issue of his or her own alive at the death of the testator. Some people may argue that if a provision only comes into effect because a deceased beneficiary has issue, then implicitly, the anti-lapse provision is signalling it is important to preserve testamentary gifts by allowing them to proceed, if necessary, through the generations. Having said this, it could seem strange to provide under s. 31 that a gift will be payable to a deceased beneficiary's estate, rather than to any issue. As one author on wills law has pointed out, the effect of s. 31, depending on what was stated in the deceased beneficiary's will, may be not to provide the issue with the gift: "So if, for example, the deceased beneficiary had a will, in which he left everything to a charity, the gift in the original testator's will would be preserved (because the beneficiary died leaving issue) but the charity – not the issue – would receive the gift!"[94]

Another perspective on this issue is that to alter s. 31, by having gifts revert to a deceased beneficiary's issue, rather than to the beneficiary's estate, is not consistent with the concept of preserving a person's testamentary wishes. Unquestionably, s. 31 as currently written helps to put into effect the testator's wishes, but what about the deceased beneficiary? It could be presumptuous to assume that the beneficiary would want to leave any gifts, received by virtue of s. 31, to his or her issue. Referring to the quoted example in the previous paragraph, the only clear direction about what the deceased beneficiary intended is to be found in his or her wish to leave everything to a charity. Unless that beneficiary had contravened some other law, as for example, by failing to properly provide for dependant children, then one could argue that the merit of fulfilling the deceased beneficiary's wishes is just as strong as having a gift revert to his or her issue.

Based on the above-noted perspectives, the Discussion Paper did not find there was a sufficiently strong reason to alter the anti-lapse provision at s. 31 of the *Wills Act*, to make a gift payable to the deceased beneficiary's surviving issue, rather than to the beneficiary's estate. Commentators tended to agree with the Discussion Paper's position.

Having reviewed the comments received on this issue, the Commission affirms its reasoning from the Discussion Paper and concludes that the anti-lapse provision in the *Wills Act* should remain unchanged. To make a gift payable to the deceased beneficiary's surviving issue, rather than to the beneficiary's estate would merely involve the substitution of one presumption for another, which the Commission could not recommend without more compelling reasons.

[94] Howlett, note 21, above, at 51.

The Commission recommends:

- The *Wills Act's* anti-lapse provision should remain unchanged.

D. OTHER ISSUES

1. Wills made outside Nova Scotia

Section 15 of the *Wills Act* involves wills created outside Nova Scotia. These wills may be admitted to probate in Nova Scotia if they satisfy the formal requirements of one of the following: Nova Scotia law; the law of the place where the will was made; the law of the testator's "domicile"[95] at the time of making the will; or the law in force in the testator's original domicile. Section 15 does not refer to real property (land). It only mentions the admissibility of these wills in connection with personal property, such as automobiles, furniture, or sums of money.[96] As a result, if created in accordance with one of the laws identified at s. 15, a will made outside Nova Scotia can be admitted to probate in Nova Scotia and transfer personal property, but not real property. The real property would be transferred in accordance with the rules involving intestacies.[97]

As in Nova Scotia, the standard approach to this issue in Canada is for the law of the place where land is situated to govern questions of the land's transfer. For instance, *Canadian Conflict of Laws*[98] indicates: "as a general rule, all questions concerning rights over immovables are governed by the *lex situs*, namely the law of the place where the immovable is situated." Any other approach may not be effective, they suggest, "because in the last resort land can only be dealt with in a manner which the *lex situs* allows." In an earlier edition, the same text

[95] Domicile is not the same as one's place of actual residence. Rather, it refers to the legal jurisdiction with which one has the closest connection and where one intends to make a permanent home: Howlett, note 21, at 2.

[96] Real property refers to land, buildings attached to land, as well as any permanent fixtures or improvements to land. Personal property involves anything capable of ownership that is not real property: Howlett, note 21, above, 2.

[97] T.G. Feeney, *The Canadian Law of Wills*, 3d. ed. (Toronto: Butterworths, 1987), vol. 1, at 190, n. 85.

[98] J.-G. Castel & J. Walker, *Canadian Conflict of Laws*, 5th ed. (Markham, Ont.: Butterworths, 2002) at para. 23.2. See also G. Groffier, *Précis de Droit International Privé Québécois*, 4th ed. (Cowansville: Éditions Yvon Blais, 1990) at para. 152.

explained that "this principle is based upon obvious considerations of convenience and expediency."[99] This general rule extends to the transfer of real property upon the owner's death.

The general rule is followed in the *Uniform Wills Act*, which at s. 39 (1) provides that "[t]he manner and formalities of making a will, and its intrinsic validity and effect, so far as it relates to an interest in land, are governed by the internal law of the place where the land is situated."

The New Brunswick wills legislation, however, makes no distinction between personal property and real property in the context of wills created outside that province:[100]

> **37 As regards the manner and formalities of making a will, a will made either within or without the Province is valid and admissible to probate if it is made in accordance with the law in force at the time of its making in the place where**
>
> **(a) the will was made,**
>
> **(b) the testator was domiciled or had his or her habitual residence when the will was made, or**
>
> **(c) the testator had his or her domicile of origin.**

Ontario has also relaxed the general principle in the context of wills. Section 37(1) of the *Succession Law Reform Act*[101] does confirm the application in general in Ontario of the standard approach: "the manner and formalities of making a will, and its essential validity and effect, so far as it relates to an interest in land, are governed by the internal law of the place where the land is situated." However, the Ontario *Act* goes on to indicate that a will is considered valid and admissible to probate in Ontario if at the time of the will's making it complied with the internal law of one of the following places: where the will was made; where the testator was then domiciled; where the testator then had his or her habitual residence; or where the testator then was a national if there was in one place one body of law governing the wills of nationals. Those criteria apply not only to wills pertaining to personal property, but also to interests in land.

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[99] J.-G. Castel, *Canadian Conflict of Laws*, 3d. ed. (Toronto: Butterworths, 1994) at 437.

[100] N.B., *Wills Act*, note 79, above, s. 37.

[101] R.S.O. 1990, c. S. 26.

The Discussion Paper acknowledged that there are historical reasons which likely explain the distinction made between personal and real property at s. 15 of the *Wills Act*. Land was the main source of wealth, and jurisdictions monitored its use and transfer very closely. This was especially so in England, from which Nova Scotia has inherited its principles of common law.[102] Also, because land cannot be moved outside a jurisdiction, it cannot escape the effect of the law of the jurisdiction where the land is situated.[103] The Discussion Paper suggested there was no longer any compelling reason to retain the distinction at s. 15. The value of land cannot be used as the only justification. It was pointed out there are many examples of personal property--bonds, share certificates, money--which can be worth far more than land. In terms of possible concerns about the standards for creating wills outside Nova Scotia, these cannot be that significant, as they do not preclude a will created outside the province from entering Nova Scotia probate. In its current form, it was suggested, s. 15 can serve as a source of frustration and inconvenience for people who have created a will outside Nova Scotia, and who have land in the province.

The Discussion Paper proposed that s. 15 be amended, to admit into probate wills validly made outside Nova Scotia with respect to real property, as it currently does for such wills involving personal property.

Among comments received, there was strong support for the Commission's suggestion on this issue. According to one commentator, the Commission's proposal concerning wills made outside Nova Scotia was so important that it alone merited the Commission undertaking a project on the *Wills Act*. Following the consensus among commentators, the Commission affirms its Discussion Paper suggestion and recommends that s. 15 of the *Wills Act* should be amended, to admit into probate wills validly made outside Nova Scotia with respect to real property, as it currently does for such wills involving personal property.

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[102] Historically in England, land holding was organized through the concept of feudal tenure. The Crown, which owned all land, distributed land to certain parties, who could in turn transfer interests in the land, with the recipients also able to transfer interests, and so on. Outside the Crown, all interests in land were held in exchange for the performance of personal obligations, such as providing military service. What resulted was a complicated pyramid of landlords and tenants, with the Crown at the top, and with every other level personally bound in some way to a landlord on the next immediate level: see, for example, W.F. Frank, *The General Principles of English Law*, 4th ed. (London: George G. Harrup & Co., 1969) at 116-117. Given the personal duties associated with land holdings, English law understandably paid close attention to transfers of land.

[103] See, for example, P.M. North & J.J. Fawcett, *Cheshire and North's Private International Law*, 12th ed. (London: Butterworths, 1992) at 784-785.

The Commission recommends:

- Section 15 of the *Wills Act* should be amended, to admit into probate wills validly made outside Nova Scotia with respect to real property, as it currently does for such wills involving personal property.

2. Suppression

Someone might wish to conceal a will, so that its terms are not put into effect. For example, imagine the scenario of an elderly parent, whose spouse is no longer living, but who has two adult children. If the parent has made a will which gives most of the estate to one child, then the other child would fare better if the will was never put into effect, and an intestacy was declared. That second child, if aware of the parent's will and its contents, might be tempted to hide the will.

The *Wills Act* at s. 33 provides a penalty of $20 for each month during which a will is suppressed. The penalty begins to accrue 30 days from the time when the will should first have been made public. This provision, which first appeared in an 1851 version of the *Wills Act*, seems unique to Nova Scotia. The amount of the penalty has remained unchanged since 1864, when $20 would have represented a considerably larger amount than it does today.[104]

The Commission has no indication that people in Nova Scotia commonly suppress wills. The Commission also notes that under s. 340 of the Canadian Criminal Code, "every one who, for a fraudulent purpose, destroys, cancels, conceals or obliterates" among others a will is liable to imprisonment for up to 10 years.

The Discussion Paper expressed the view that s. 33 of the *Wills Act* still has a purpose. Being aware of s. 33, it was suggested, might prevent some people from suppressing a will. In situations where suppression of a will has occurred, the application of a fine through s. 33 might be seen as more appropriate than a jail sentence under the Criminal Code. If, however, s. 33 is to remain in the *Act*, the amount of the penalty must reflect the seriousness of the prohibited activity. The current amount of $20 a month is not much of a deterrent. The

[104] Currency values change over time for many reasons. To provide a rough idea of how much $20 could formerly buy, the Bank of Canada estimates at its website <www.bank-banque-canada.ca/en/inflationcalc.htm> that $20 in 1914 (earliest year for which figures are provided) would be worth $341.11 in 2003 (date accessed: 10 November 2003).

Discussion Paper therefore suggested that the $20 per month penalty for suppression of a will should be revised upwards, to reflect contemporary currency values.

For the most part, commentators supported the Discussion Paper proposal. Some commentators suggested that the *Wills Act* could also be amended, to provide for the availability of civil damages against someone who suppresses a will.

The Commission remains of the view that s. 33 could serve some deterrent effect, but only if it was amended, to reflect contemporary currency values. It should not be overlooked that s. 33 is a penalty provision. Upon its application, any penalty would be paid to the court, and would not be used to compensate people who suffered because of a will being suppressed. Rather, people who suffered civil damages through suppression would be entitled to commence a legal action against the person involved. This right, based on the common law, would be available outside of the *Wills Act*. Depending on the circumstances, one might base a legal action, for example, on allegations of fraud. The Commission recommends that the penalty for suppression of a will should be retained, but should be revised upwards to reflect contemporary currency values.

The Commission recommends:

- The penalty for suppression of a will should be retained, but should also be revised upwards, to reflect contemporary currency values.

IV. SUMMARY OF RECOMMENDATIONS

A. Formation of a Will

1. **Holograph wills** [pages 13-14]

The Commission recommends:

- Holograph wills, and more particularly, the *Uniform Wills Act* provision on holograph wills, should be adopted in Nova Scotia.

2. **Privileged wills** [pages 14-17]

The Commission recommends:

- The privileged wills section should be retained in the *Wills Act*, but consistent with the majority of other Canadian jurisdictions, the term "active service" should replace the current standard of "actual military service".

3. **Videotape, cinematographic & electronic wills** [pages 17-18]

The Commission recommends:

- The *Wills Act* should not be changed to allow wills in non-paper format (video, cinematographic, or electronic) in Nova Scotia.

4. **Wills by minors** [pages 18-22]

The Commission recommends:

- When referring to the age at which a will may be validly created, the *Wills Act* should be consistent and should set the relevant age by reference to the *Age of Majority Act*.

- For people who are under the age of majority, yet who wish to create a valid will, the *Wills Act* should include a standard confirmatory procedure. An objective third party, such as the Public Trustee, should be appointed to certify whether a minor has the testamentary capacity required to create a valid will.

5. **Executor as a witness** [pages 22-25]

- Section 12 of the *Wills Act* should be amended, to eliminate the possibility that it could be used to challenge the appointment of an executor who had witnessed a will.

- At s. 12 and elsewhere, any matters of relevance to registered domestic partners should be expressly mentioned in the *Wills Act*.

6. **Substantial compliance** [pages 25-28]

The Commission recommends:

- The Prince Edward Island substantial compliance provision, which provides a court with discretion to allow as valid a will which does not comply with all formal requirements, but also requires as a minimum the deceased's signature, should be adopted in Nova Scotia.

B. Revocation of a Will

1. **Effect of marriage** [pages 28-30]

The Commission recommends:

- The current *Wills Act* provision which, subject to certain exceptions, revokes a will upon marriage should be retained.

- An amended *Wills Act* should clearly indicate that the revocation on marriage section also applies upon registration of a domestic partnership.

- The Issuer of Marriage Licences should provide a copy of a standard notice, which explains the effect of marriage on wills, to people who apply for a marriage licence. An equivalent notice should be provided by the Office of the Registrar General to people who wish to register a domestic partnership.

2. **Effect of divorce** [pages 30-33]

The Commission recommends:

- A will should remain valid upon divorce, but subject to a contrary intention in the will, the ex-spouse should be treated as having predeceased the testator, and anything (gifts, benefits, or appointments) that would otherwise have been given to the ex-spouse should be revoked. An amended *Wills Act* should clearly indicate that the rule setting out the effect of a divorce on a will also applies in the event that a domestic partnership is de-registered.

- Consistent with the Commission's recommendation involving a notice about the effect of marriage, a notice about the effect of divorce on wills should be provided to

divorcing parties by the prothonotary of the Nova Scotia Supreme Court. The Office of the Registrar General should provide an equivalent notice to people who de-register a domestic partnership.

C. Operation and Interpretation of a Will

The anti-lapse section [pages 33-35]

The Commission recommends:

- The *Wills Act's* anti-lapse provision should remain unchanged.

D. Other Issues

1. **Wills made outside Nova Scotia** [pages 35-38]

The Commission recommends:

- Section 15 of the *Wills Act* should be amended, to admit into probate wills validly made outside Nova Scotia with respect to real property, as it currently does for such wills involving personal property.

2. **Suppression** [pages 38-39]

The Commission recommends:

- The penalty for suppression of a will should be retained, but should also be revised upwards, to reflect contemporary currency values.

APPENDIX A

List of Proposals from Discussion Paper

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List of Proposals from Discussion Paper

PROPOSALS FOR REFORM:

A. Formation of a Will

1. **Holograph wills** [pages 12-13]

   The Commission invites comments on:

   - the appropriateness of explicitly allowing holograph wills in Nova Scotia.

2. **Privileged wills** [pages 13-16]

   The Commission invites comments on:

   - whether privileged wills should be retained in Nova Scotia, and if so, whether any changes should be made to the availability, nature, or duration of privileged wills.

3. **Videotape, cinematographic & electronic wills** [pages 16-17]

   The Commission invites comments on:

   - whether there is any perceived need to allow wills in non-paper format (video, cinematographic, or electronic) in Nova Scotia.

4. **Wills by minors** [pages 17-18]

   - As a matter of fairness and in recognition of societal trends, the matter of a minimum age requirement for creating a valid will, if it is to be part of the *Wills Act*, should be approached consistently.

   The Commission invites suggestions:

   - about what minimum age, if any, for making a will should be set out in the *Wills Act*.

5. **Executor as a witness** [pages 18-20]

   - Section 12 of the *Wills Act* should be amended, to eliminate the possibility that it could be used to challenge the appointment of an executor who had witnessed a will.

6. **Substantial compliance** [pages 21-23]

- The Prince Edward Island substantial compliance provision, which provides a court with discretion to allow as valid a will which does not comply with all formal requirements, but also requires as a minimum the deceased's signature, should be adopted in Nova Scotia.

B. Revocation of a Will

Effect of marriage and divorce [pages 24-26]

- The current *Wills Act* provision which, subject to certain exceptions, revokes a will upon marriage should be retained.

- The Issuer of Marriage Licences should provide a copy of a standard notice, which explains the effect of marriage on wills, to people who apply for a marriage licence.

The Commission invites comments:

- about the appropriateness of having the *Wills Act* revoke wills upon divorce.

C. Operation and Interpretation of a Will

The anti-lapse section [page 26-27]

The Commission invites comments on:

- the appropriateness of amending the anti-lapse provision, to make a gift payable to the deceased beneficiary's surviving issue, rather than to the beneficiary's estate.

D. Other Issues

1. **Wills made outside Nova Scotia** [pages 28-30]

- S. 15 should be amended, to admit into probate wills validly made outside Nova Scotia with respect to real property, as it currently does for such wills involving personal property.

2. **Suppression** [pages 30-31]

- The penalty for suppression of a will should be retained, but should also be revised upwards, to reflect contemporary currency values.

APPENDIX B

List of Advisory Group Members
and
People Who Commented on Discussion Paper

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People Who Commented on Discussion Paper

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